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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re N.A., a Person Coming Under
the Juvenile Court Law.

SAN DIEGO COUNTY HEALTH
AND HUMAN SERVICES
AGENCY,

Plaintiff and Respondent,

v.

T.A.,

Defendant and Appellant.

D077761

(Super. Ct. No. NJ15516)

APPEAL from orders of the Superior Court of San Diego County,
Kimberlee A. Lagotta, Judge. Affirmed.

Christopher Blake, under appointment by the Court of Appeal, for
Defendant and Appellant.

Thomas E. Montgomery, County Counsel, Caitlin E. Rae, Chief Deputy
County Counsel, and Emily Harlan, Deputy County Counsel, for Plaintiff and
Respondent.

T.A. (Mother) appeals an order terminating her parental rights. Mother contends that the juvenile court erred by terminating her parental rights after finding that the beneficial parent-child relationship exception to adoption did not apply. (Welf. & Inst. Code, § 366.26, subd. (c)(1)(B)(i).)¹ She also challenges the denial of her motion pursuant to section 388 to return her daughter to her care and reinstate her reunification services based on a change in circumstances. We conclude that the juvenile court did not err in making these rulings and therefore affirm.

FACTUAL AND PROCEDURAL BACKGROUND²

In May 2019, the San Diego County Health and Human Services Agency (the Agency) petitioned the juvenile court under section 300, subdivision (b), on behalf of one-year-old N.A. The Agency alleged that Mother was unable to provide a suitable home for N.A. due to her current use of methamphetamine and long history of substance abuse.³

As discussed in the detention report, the Agency received a report that Mother was living in a house, which was infested with rodents and cockroaches, with other adults selling and consuming drugs. During a visit,

¹ Further statutory references are to the Welfare and Institutions Code unless otherwise stated.

² “In accord with the usual rules on appeal, we state the facts in the manner most favorable to the dependency court’s order.” (*In re Janee W.* (2006) 140 Cal.App.4th 1444, 1448, fn. 1.)

³ N.A.’s biological father (Father), who has never met N.A., was not identified and located until late in the proceedings. Father did not receive reunification services, did not visit N.A., and had only minimal participation in the proceedings before his parental rights were terminated. Father has not filed an appeal and given his minimal role in the underlying proceedings, we do not discuss his involvement in the trial court.

the Agency, accompanied by police officers, discovered drugs in the room Mother shared with N.A. The drugs were within the reach of N.A., leading the police to arrest Mother for child endangerment and for outstanding warrants. After being released on bail, Mother agreed to a safety plan to move out of the home and leave N.A. in the maternal grandmother's care while Mother received substance abuse treatment, a mental health screening, and participated in parenting classes. Mother, however, failed to comply with the plan, leading to the filing of the petition and issuance of a protective warrant to remove N.A. from the home.

The juvenile court found that the Agency had made an adequate showing that N.A. was a person described by section 300, subdivision (b), and ordered her detained in out-of-home care.

In its jurisdiction report, the Agency noted that after the detention hearing, Mother failed to comply with requested drug testing and would not meet with the social worker or a substance abuse specialist. In an addendum report, the Agency noted that Mother continued to evade drug testing and was often late for visits and medical appointments for N.A.

At N.A.'s jurisdiction and disposition hearing in June 2019, the court sustained the allegations of the petition under section 300, subdivision (b). The court placed N.A. in a foster home and ordered reunification services for Mother.

In advance of the six-month review hearing, the Agency reported that Mother had inconsistent housing and had been recently arrested twice for theft and drug possession. Mother continued to visit N.A. one or two times per week and always called for scheduled telephone conversations with N.A. Mother continued to evade scheduled drug tests and missed substance abuse assessment appointments. She also repeatedly cancelled appointments for

parent education. Although her visits with N.A. went well, she was frequently late to the visits and N.A. often suffered from negative behaviors after the visits. The Agency recommended that reunification services be terminated. In an addendum report, the Agency noted that Mother was failing to address her substance abuse issues and it continued to recommend the termination of reunification services.

At a contested six-month review hearing, the Agency submitted on the reports. Mother testified regarding her recent attempts at completing her case plan. Finding that Mother was continuing to minimize her drug use and failing to meaningfully participate in the services included in her case plan, the court terminated reunification services and set a selection and implementation hearing pursuant to section 366.26.

In its initial assessment report, the Agency recommended that the court terminate parental rights and find N.A. to be adoptable. In the report, the social worker acknowledged that Mother's visits with N.A. were generally positive, but that Mother continued to have difficulty prioritizing N.A.'s needs above her own needs. Mother claimed to be making progress on her case plan, but failed to provide documentation to support her assertions. The Agency noted that N.A.'s current foster parents were interested in adopting her and were qualified to do so.

In a final addendum report filed immediately before the hearing, the Agency noted that Mother should be commended for her continued visits, but that Mother "was unable to consistently put [N.A.]'s needs above her own." The social worker opined that Mother's relationship with N.A. "does not rise to the level of a true parent-child relationship."

Just days before the section 366.26 hearing, Mother filed a request pursuant to section 388 to stay the hearing, reinstate reunification services,

and return N.A. to her care. Mother contended that since the last hearing, she had completed a parenting program, a substance abuse treatment program, and addressed her mental health issues.

At the selection and implementation hearing, the court first considered Mother's section 388 petition. Mother's counsel argued that although Mother "had a lot of issues" with participation in services during the reunification period, the court's termination of reunification services caused Mother to begin taking her case plan seriously. She also argued it was in N.A.'s best interests to reunify with Mother as evidenced by the positive visits between Mother and N.A. Both the Agency and N.A.'s counsel asked the court to deny the petition. The juvenile court found Mother's petition established a prima facie case of changed circumstances and allowed Mother to testify.

In her testimony, Mother discussed her participation in parenting classes. Mother testified that she also participated in substance abuse treatment and, during that treatment, completed multiple negative drug tests. She claimed she sporadically attended Narcotics Anonymous meetings. Mother explained that she was currently residing in hotels and hoping to find permanent housing soon. Mother also testified about her weekly visits with N.A.

In its ruling, the juvenile court first considered Mother's section 388 petition. The court focused on N.A.'s young age and accepted that Mother's "circumstances are changing." However, it found that there was not sufficient proof that "her circumstances have changed and that she is in a position where the court would feel comfortable returning the child to her by the 18-month review date." The court also found that it would not be in the best interests of N.A. to delay selection and implementation of a permanent plan because N.A. had been placed in her foster home for almost one year and

her foster parents wanted to adopt her. Accordingly, the court found the section 388 petition “falls on both prongs” and denied the petition.

Turning to the selection and implementation issue, the court proceeded to find that N.A. was specifically and generally adoptable and that none of the exceptions to adoption under section 366.26, subdivision (c)(1) applied. Regarding Mother’s relationship with N.A., the court found that “[a]lthough the visits are positive, there’s a lot of talk about play and some concerns about separation at the end of play, but as the social worker points out, the relationship is much more of a friendly visitor and not that of a parent relationship.” The court found that terminating parental rights would not be detrimental to N.A. The court terminated parental rights and selected adoption as N.A.’s permanent plan. Mother appealed.⁴

DISCUSSION

I

Mother contends that the juvenile court erred in denying her petition filed pursuant to section 388 to modify N.A.’s placement by returning N.A. to her care and to reinstate reunification services. Under section 388, a parent may petition the juvenile court to change, modify, or set aside a previous order on the grounds of changed circumstances or new evidence. The petitioning parent bears the burden of showing by a preponderance of the evidence that there is new evidence or changed circumstances that make a change in placement in the best interests of the child. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317.) “After the termination of reunification services, the parents’ interest in the care, custody and companionship of the child are no longer paramount. Rather, at this point ‘the focus shifts to the needs of

⁴ Mother’s notice of appeal references both the order denying her section 388 petition and the order terminating her parental rights.

the child for permanency and stability’ [Citation] A court hearing a motion for change of placement at this stage of the proceedings must recognize this shift of focus in determining the ultimate question before it, that is, the best interests of the child.” (*Ibid.*)

As Mother acknowledges, we review the juvenile court’s decision under the abuse of discretion standard of review. (*In re J.C.* (2014) 226 Cal.App.4th 503, 525-526 (*J.C.*)). A proper exercise of discretion is “‘not a capricious or arbitrary discretion, but an impartial discretion, guided and controlled by fixed legal principles . . . to be exercised in conformity with the spirit of the law, and in a manner to subserve and not to impede or defeat the ends of substantial justice.’ [Citations.]” (*In re Robert L.* (1993) 21 Cal.App.4th 1057, 1066.) Exercises of discretion must be “‘grounded in reasoned judgment and guided by legal principles and policies appropriate to the particular matter at issue.’ [Citations.]” (*F.T. v. L.J.* (2011) 194 Cal.App.4th 1, 15.) Thus, although the abuse of discretion standard is deferential, “it is not empty.” (*People v. Williams* (1998) 17 Cal.4th 148, 162.) The standard “asks in substance whether the ruling in question ‘falls outside the bounds of reason’ under the applicable law and the relevant facts. [Citations.]” (*Ibid.*)

Mother contends that her recent progress, as evidenced by her participation in programs to address her substance abuse, mental health, and parenting deficiencies, combined with her consistent positive visits with N.A., constituted a change in circumstances warranting reconsideration of N.A.’s placement and resumption of reunification services. On appeal, she also asks this court to consider the context in which Mother was participating in services. She contends that the COVID-19 pandemic made it more difficult to find treatment and, in that context, her efforts were sufficient under the circumstances to meet her burden.

This contention, however, is not supported by the evidence. Mother testified that the pandemic and the need to stay at home made it *easier* to stay sober. Nothing in her testimony suggests that the pandemic prevented her from obtaining services.⁵

The juvenile court's finding that Mother's circumstances were "changing" but not "changed" is not arbitrary or capricious. While her minimal participation in services was an improvement from her near-complete refusal to participate in any services before the juvenile court terminated reunification services, Mother did not demonstrate that she made significant progress in addressing her many deficiencies that prevented her from safely parenting N.A. Although she attended some Narcotics Anonymous meetings, she admitted she stopped attending and struggled to explain the various steps of the program. She admitted to not having stable

⁵ Mother also asks this court to "take notice" of "secondary source materials" her counsel received at a virtual seminar regarding the effects of the pandemic on court proceedings. Mother contends these materials may be considered under rule 8.115(c) of the California Rules of Court, but no such rule exists. It appears Mother may have intended to rely upon California Rules of Court, rule 8.1115(c), which permits attachment of an unpublished opinion in circumstances that do not apply here. Mother may also be relying on California Rules of Court, rule 8.204(d), which permits a party to attach "copies of exhibits or other materials in the appellate record or copies of relevant local, state, or federal regulations or rules, out-of-state statutes, or other similar citable materials that are not readily accessible." None of the materials submitted by Mother qualify as "citable materials." Construed liberally, the materials also do not appear to be proper matters for judicial notice. Accordingly, we deny Mother's request to "take notice" of the materials. Regardless, the Agency does not dispute the general notion that the COVID-19 pandemic has had some effect on juvenile dependency proceedings. However, none of these materials support Mother's claim that the pandemic, as applied *specifically* to her circumstances, warrants a finding that the trial court abused its discretion in denying Mother's section 388 petition.

housing. Mother claimed she had tested negative for drugs on multiple occasions, but could not provide any documentation to support her assertion. As the juvenile court found, Mother's improvement, while commendable, was not sufficient to suggest that a change of placement was warranted.

Moreover, even assuming the juvenile court erred in finding Mother failed to establish a change in circumstances, she has not demonstrated that the juvenile court abused its discretion in finding that it would not be in N.A.'s best interests to return to Mother or to order services for Mother to facilitate that change in placement. N.A. was almost three years old by the time of the hearing and had spent nearly a year in her current placement. N.A. was thriving in her current placement with a prospective adoptive family, where she was provided with a stable home. When contrasted with Mother's extensive history of substance abuse and lack of stability, the juvenile court reasonably concluded that it would be in N.A.'s best interests to remain in her current placement and for the court to proceed to the selection and implementation hearing. Accordingly, the court's denial of Mother's section 388 petition did not constitute an abuse of discretion.

II

Mother contends that the court erred in selecting adoption as the permanent plan for N.A. following the selection and implementation hearing held pursuant to section 366.26. She does not contest N.A.'s adoptability, but rather contends that the beneficial parent-child relationship exception to a finding of adoptability applies here. We disagree.

“‘Once reunification services are ordered terminated, the focus shifts to the needs of the child for permanency and stability.’ [Citation.] ‘A section 366.26 hearing . . . is a hearing specifically designed to select and implement a permanent plan for the child.’ [Citation.] It is designed to protect

children’s ‘compelling rights . . . to have a placement that is stable, permanent, and that allows the caretaker to make a full emotional commitment to the child.’ [Citation.] ‘The Legislature has declared that California has an interest in providing stable, permanent homes for children who have been removed from parental custody and for whom reunification efforts with their parents have been unsuccessful.’ ” (*In re Celine R.* (2003) 31 Cal.4th 45, 52-53 (*Celine R.*))

“Whenever the court finds ‘that it is likely the child will be adopted, the court shall terminate parental rights and order the child placed for adoption.’ [Citation.] The circumstance that the court has terminated reunification services provides ‘a sufficient basis for termination of parental rights unless the court finds a compelling reason for determining that termination would be detrimental to the child due to one or more’ of specified circumstances. [Citation.] The Legislature has thus determined that, where possible, adoption is the first choice. ‘Adoption is the Legislature’s first choice because it gives the child the best chance at [a full] emotional commitment from a responsible caretaker.’ ” (*Celine R., supra*, 31 Cal.4th at p. 53.)

“[I]f the child is adoptable . . . adoption is the norm. Indeed, the court must order adoption and its necessary consequence, termination of parental rights, unless one of the specified circumstances provides a compelling reason for finding that termination of parental rights would be detrimental to the child. The specified statutory circumstances—actually, *exceptions* to the general rule that the court must choose adoption where possible—‘must be considered in view of the legislative preference for adoption when reunification efforts have failed.’ [Citation.] At this stage of the dependency proceedings, ‘it becomes inimical to the interests of the minor to heavily burden efforts to place the child in a permanent alternative home.’

[Citation.] The statutory exceptions merely permit the court, in *exceptional circumstances* [citation], to choose an option other than the norm, which remains adoption.” (*Celine R.*, *supra*, 31 Cal.4th at p. 53.)

Mother contends the beneficial parent-child relationship exception applies such that her parental rights should not have been terminated and the court should have selected an alternative permanent plan. The beneficial parent-child relationship exception applies where “[t]he court finds a compelling reason for determining that termination would be detrimental to the child” because “[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.” (§ 366.26, subd. (c)(1)(B)(i).) The parent bears the burden in the juvenile court of showing the exception applies. (*J.C.*, *supra*, 226 Cal.App.4th at p. 529.)

The Agency notes that the juvenile court did not make an express finding regarding whether Mother maintained regular visitation and contact with N.A. in the months preceding the section 366.26 hearing, but concedes that Mother made a sufficient showing that she maintained regular visitation. However, even assuming Mother’s visits were sufficiently consistent, we see no error by the juvenile court in finding she failed to show the existence of a beneficial parent-child relationship.

“We apply the substantial evidence standard of review to the factual issue of the existence of a beneficial parental relationship, and the abuse of discretion standard to the determination of whether there is a compelling

reason for finding that termination would be detrimental to the child.” (*In re Anthony B.* (2015) 239 Cal.App.4th 389, 395.)⁶

“To overcome the preference for adoption and avoid termination of the natural parent’s rights, the parent must show that severing the natural parent-child relationship would deprive the child of a *substantial*, positive emotional attachment such that the child would be greatly harmed.

[Citations.] A biological parent who has failed to reunify with an adoptable child may not derail an adoption merely by showing the child would derive *some* benefit from continuing a relationship maintained during periods of visitation with the parent. [Citation.] A child who has been adjudged a dependent of the juvenile court should not be deprived of an adoptive parent when the natural parent has maintained a relationship that may be beneficial to some degree, but that does not meet the child’s need for a parent.” (*In re Angel B.* (2002) 97 Cal.App.4th 454, 466 (*Angel B.*)).

“A parent must show more than frequent and loving contact or pleasant visits. [Citation.] ‘Interaction between natural parent and child will always confer some incidental benefit to the child The relationship arises from the day-to-day interaction, companionship and shared experiences.’

[Citation.] The parent must show he or she occupies a parental role in the

⁶ Mother asserts this court should apply the substantial evidence standard of review. (See, e.g., *In re Autumn H.* (1994) 27 Cal.App.4th 567, 576.) We believe the hybrid standard of review is correct for the reasons stated in *J.C.*, *supra*, 226 Cal.App.4th at pages 530-531, and we need not add our voice to the discussion surrounding the proper standard in this instance. This issue is currently pending in the California Supreme Court in *In re Caden C.* (2019) 34 Cal.App.5th 87, review granted July 24, 2019, S255839. Our conclusion in this case would be the same under either of these standards. For this same reason, we decline Mother’s request that we defer consideration of this appeal until after the Supreme Court’s decision in *In re Caden C.*

child's life, resulting in a significant, positive, emotional attachment between child and parent.” (*In re C.F.* (2011) 193 Cal.App.4th 549, 555.) “A friendly relationship . . . ‘is simply not enough to outweigh the sense of security and belonging an adoptive home would provide.’” (*In re Jason J.* (2009) 175 Cal.App.4th 922, 938.) “While the exact nature of the kind of parent/child relationship which must exist to trigger the application of the statutory exception to terminating parental rights is not defined in the statute, the relationship must be such that the child would suffer detriment from its termination.” (*Angel B., supra*, 97 Cal.App.4th at p. 467, fn. omitted.)

The juvenile court found that Mother did not have a beneficial parent-child relationship with N.A. that outweighed the benefits of adoption. Mother contends otherwise, pointing to the evidence in the record suggesting that the visits improved over time and that N.A. showed “obvious love for her mother.” The role of this court on appeal, however, is not to second-guess the juvenile court’s decision or to reweigh the evidence. Instead, we consider whether substantial evidence supports the juvenile court’s ruling that no sufficient relationship exists. We conclude the evidence supports that finding.

Neither the Agency nor the juvenile court disputed that Mother and N.A. had a generally loving relationship and enjoyed each other’s company. As the juvenile court noted, the record suggests that Mother and N.A. were “friendly” with a lot of “play.” This, however, is not enough to satisfy the beneficial parent-child relationship exception. (*Autumn H., supra*, 27 Cal.App.4th at p. 575.) While there was some measure of benefit to N.A. arising from her relationship with Mother, the evidence supports the juvenile court’s finding that it was not sufficiently significant to outweigh the benefits of adoption.

The Agency's reports consistently note that Mother struggled to put N.A.'s needs before her own during visits. Mother was often late to the visits, spent significant time during the visits on video and voice calls, and disregarded orders to not surprise N.A. with an introduction to her biological father, whom she had never met. Although Mother would play with N.A., she expressed no interest in learning about N.A.'s progress in therapy. On multiple occasions, when N.A. was distressed during visits, Mother had to call N.A.'s foster mother for help to calm N.A. down. At the end of visits, N.A. was usually not distressed to leave Mother and return to her foster home. This evidence is sufficient to support the juvenile court's conclusion that although Mother consistently visited with N.A., her relationship with N.A. was not parental.

Moreover, even assuming Mother established the existence of a positive parent-child relationship, she has not shown that the juvenile court abused its discretion by finding that the termination of parental rights would not be detrimental to N.A. Rather than suffering when she was separated from Mother, N.A. was thriving in her placement with a foster family. Thus, the juvenile court did not abuse its discretion in implicitly finding that the bond between Mother and N.A. was not of such a quality that maintaining that relationship would outweigh the benefits of adoption. Mother has not shown that the court abused its discretion by finding that the beneficial parent-child relationship exception did not apply.

DISPOSITION

The orders are affirmed.

IRION, J.

WE CONCUR:

McCONNELL, P. J.

BENKE, J.